COMMENT.

The maxim, "*Nemo tenetur seipsum accusare*," by its incorporation into the Fifth Amendment of the Constitution has become one of the foundations of our liberty. A mere rule of evidence in England, it is here made a part of the fundamental law, and, so far as we know, is embodied in every State Constitution as well. Its object plainly is to protect the witness himself and no one else, and the compulsion against which he is protected is both physical and mental duress. Many of the States, and Congress also, have passed statutes having for their object the compelling of witnesses to testify even when their testimony would tend to incriminate themselves, by offering them immunity therefor. But these statutes, to be upheld, must be as broad as the Constitutional provision which they seek to supplant and must give absolute indemnity, so that the witness can never be prosecuted for the crime which he may disclose or which his testimony may be the means of discovering. The compulsion of these statutes has been strenuously resisted by those whom it was sought to compel to testify thereunder, by demanding the protection of the Fifth Amendment. Especially numerous have been the controversies arising out of attempts to secure the protection of this amendment against the provisions of the Interstate Commerce Law. The case of *Counselman* v. *Hitchcock*, 142 U. S. 547, decided that the immunity offered by Revised Statutes, Section 860, was insufficient and that the witness could not be compelled to speak. This was probably the cause of an amendment to the Interstate Commerce Act passed in 1893 to effect the same object, which was sustained in *Brown* v. *Walker*, 161 U. S. 591 (four judges dissenting) as giving complete immunity.

The proceedings before pension examiners under Revised Statutes, Section 4744, are almost completely analogous to the proceedings before the Interstate Commerce Commission, except that no amendment giving complete immunity has been adopted and Revised Statutes, Section 860, still applies; but they have not been challenged and investigated as fully, probably because of the differences between the two classes of citizens examined. For this reason the case of *United States* v. *Bell*, 81 Fed. Rep. 830, becomes very interesting. Bell, an ignorant negro, had by the

laxity of our laws, been admitted to the bar and made a Notary Public, and, acting in this capacity, had perpetrated certain frauds on the Pension Bureau, consisting in the fraudulent issuing of certain vouchers and the affixing of his notarial seal to a false affidavit. He was compelled by the pension examiner to come before him for examination, although no subpœna was issued for him, and was then interrogated about the execution of these documents, without being told by the examiner that he had the right to remain silent on any matter that would tend to incriminate him. As was natural for an ignorant negro, who had probably never heard of this constitutional provision, was unaware of his rights in the matter, and was not permitted by the examiner to consult counsel, he swore falsely and the report containing his answers was afterwards introduced in evidence against him on a prosecution for perjury.

All these statutes which seek to compel a witness's testimony by offering him immunity therefor, contain a proviso that no person shall be exempt from prosecution and punishment for perjury committed in so testifying. Of course, if the immunity offered is as broad as the Constitutional provision, the witness may be compelled to answer and as a corollary may be indicted for perjury if he swears falsely. But Counselman's case settled it that the immunity offered by Revised Statutes, Section 860, is not as broad as the Constitutional guaranty, and therefore Bell was not compelled to answer. Whether this proviso that the witness shall not be protected against prosecution for perjury committed during the examination itself is consistent with the protection of the Fifth Amendment has never been decided, and the court here expressly refused to decide the point, holding that the fact that the examination was taken under compulsion and that the witness was ignorant of his rights and was not warned of his privilege alone made the record inadmissible. The witness did not waive his privilege, as he did not knowingly and understandingly abandon it, and the examination was almost purely inquisitorial, as no sufficient safeguards against self-incriminating testimony were thrown around him.

Within the last few years several of the States have passed laws regulating the sale of "convict made" goods. Two of the largest, New York and Ohio, passed in 1894 such laws differing from each other in no essential particular. The Supreme Court of Ohio in *Arnold* v. *Yander*, 47 N. E. Rep. 50, has recently declared the law of that State to be unconstitutional, as conflicting

with Article I, Section 8, of the United States Constitution—the Interstate Commerce clause. It was made unlawful for any person to expose for sale in Ohio any convict-made goods without first obtaining from the Secretary of State a license; but the act especially provided that it should not affect the products of the prisons of the State of Ohio. In *Mobile Co.* v. *Kimball*, 102 U. S. 691, 702, commerce is defined as consisting in "intercourse and traffic, including in these terms navigation, and the transportation and transit of persons and property, as well as the purchase, sale and exchange of commodities." No State Legislature, only Congress, can declare that convict-made goods are not articles of commerce and then discriminate against them or exclude them from the State by unfriendly legislation. And since *Leloup* v. *Port of Mobile*, 127 U. S. 640, the license fee is a tax upon goods imported from another State and therefore an illegal interference with interstate commerce.

The New York law has not yet been passed upon by its courts, but when the time comes, the same conclusion cannot fail to be reached by them. In *People* v *Hawkins*, 85 Hun. 43, a kindred law providing that no convict-made goods of other States can be offered for sale in New York State without the label "convict made," was held unconstitutional on the same grounds as above.